MERITA MERCHANT BANK SINGAPORE LTD

v.

BENATULIN TIMUR SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
MOHD HISHAMUDIN YUNUS J
[NO: D6-22-691-1998]
12 SEPTEMBER 2002
(5 MAY 2004)

CIVIL PROCEDURE: *Trial - Proceedings at trial - Trial part heard by judge who subsequently retired - Whether judge taking over should hear trial de novo or continue from stage at which it was left by retired judge - Continuation of trial - Whether consent of parties required - Rules of the High Court 1980, O. 35 r. 11 - Courts of Judicature Act 1964, ss. 4, 18*

CIVIL PROCEDURE: *Rules of court - Proceedings at trial - Continuation of trial by another judge - Whether consent of parties required - Rules of the High Court 1980, O. 35 r. 11 - Courts of Judicature Act 1964, ss. 4, 18*

The trial of this case was part heard by a judge who had subsequently retired. The parties raised the issue as to whether the judge taking over should hear the trial *de novo* or whether he should continue from the stage at which it was left by the retired judge. It was further raised that consent of both parties should be obtained if the judge were to continue with the trial from the stage at which it was left by the retired judge in accordance with O. 35 r. 11 of the Rules of the High Court 1980 ('RHC').

Held (trial to continue from the stage at which it was left by the previous judge):

[1] By reason of s. 4 of the Courts of Judicature Act 1964 ('CJA'), s. 18 of the same as amended by Act A940 prevails over O. 35 r. 11 RHC. The courts with effect from the date when Act A940 came into force, *ie*, 2 February 1996, must disregard O. 35 r. 11 RHC. Even without recourse to s. 4 CJA, s. 18 prevails over O. 35 RHC since an Act of Parliament prevails over a subsidiary legislation. It follows that a judge is not required to obtain the consent of both parties in order to continue with a trial from the stage at which it was left by the previous judge. (p 50 d-e)

[2] The general rule is that a judge taking over the conduct of a trial that has been part heard by another judge ought to continue with the trial from the stage at which it was left by the previous judge. This is in the interest of justice so as to avoid delays in the proceedings and unnecessary costs to the parties. Hearing the case *de novo* should only be an exception to the general rule. The exceptional situation is where a substantial likelihood of injustice will result if the case is not heard *de novo.* (p 51 c-e)

[3] The onus is on the party requesting that the trial be heard *de novo* to satisfy the court that the case merits a *de novo* hearing. It is not for the party submitting that the subsequent judge should continue from the stage at which it was left by the previous judge to convince the court that the case should not be heard *de novo*. (p 51 f)

[3a] The second defendant failed to explain to the court why, in the interest of justice, this trial ought to be heard *de novo.* On the other hand, although it was not incumbent upon the plaintiff to convince the court that the trial should not be heard *de novo*, the plaintiff had taken pains to explain that it was an exercise in futility for the court to hear the trial *de novo.* Also, that it was unjust to the plaintiff if the trial was heard *de novo* as the two relevant witnesses resided in Finland and in Singapore respectively. To recall these two witnesses would result in the incurring of substantial expenses and delay in the proceedings. Further, there was nothing in the notes of evidence as recorded by the retired judge to warrant the calling of the two witnesses – at least not, for the time being. (pp 51 h & 52 a-f)

Case(s) referred to:
Goh Cheng Teik & Anor v. Syarikat Guan Ho & Ors [1997] 4 MLJ 403 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 4, 18
Rules of the High Court 1980, O. 35 r. 11

For the plaintiff - Lewis Lim; M/s Lee Ong & Kandiah
For the 2nd defendant - J Doshi; M/s Abdullah & Zainudin

Reported by Usha Thiagarajah

JUDGMENT

Mohd Hishamudin Yunus J:

In this case, the trial was part heard by Rekhraj J on 19 and 20 March 2001. Before him two witnesses (PW1 and PW2) of the plaintiff completed their testimonies. The trial was then adjourned to 30 July 2001 for the continued hearing of the plaintiff's case. However, on 30 July the case was further adjourned without any hearing as the judge was not well. It was adjourned to 18 and 19 October 2001, but for some reason the trial did not proceed on these dates. Thereafter, Rekhraj J retired.

When the case came for mentioned before me on 1 March 2002 to fix a date for the continued hearing suitable to the plaintiff and the 2nd defendant (default judgment had previously already been entered against the 1st defendant), the parties raised the issue as to whether I should hear the case *de novo* or whether I should continue with the trial from the stage where Rekhraj J left before he retired.

The learned counsel for the plaintiff submitted that I should continue with the trial from the stage where Rekhraj J left. The second defendant, however, argued that I ought to hear the case de novo.

Accordingly, I fixed 24 June 2002 for the parties to submit on the issue.

On 24 June 2004, it was agreed by parties – and I so directed – that the argument on the issue should be presented by way of written submissions.

Parties accordingly, submitted their written submissions.

Having considered the written submissions, on 12 September 2002 I ruled that I should proceed to hear the case from the stage where Rekhraj J left.

I shall now give my reasons for the ruling.

The learned counsel for the defendant, in urging this court to hear the case *de novo*, relied on:

(a) Order 35 r. 11 of the Rules of the High Court 1980 ('the RHC'); and

(b) The decision of Jeffrey Tan JC (as he then was) in *Goh Cheng Teik & Anor v. Syarikat Guan Ho & Ors* [1997] 4 MLJ 403.

Order 35 r. 11 of the RHC reads:

> **Continuation of trial by another Judge.**
>
> 11 (1) When a Judge who has commenced a trial of any proceedings is unable through death, illness or other cause to conclude the trial, another Judge may with the consent of the parties deal with the evidence already recorded and proceed with the trial from the stage at which the previous Judge left.
>
> (2) Nothing herein shall prevent the Judge who continues the trial from recalling all or any of the witnesses or taking their evidence afresh.

In *Goh Cheng Teik* the learned judge, after setting out the provisions of s. 18 of the Courts of Judicature Act 1964 ('the CJA'), ruled (at p. 407-408):

> Even with the enabling powers, the continuation of proceedings by another Judge requires the consent of the parties (see O. 35 r. 11 of the Rules of the High Court 1980), and if the required consent is not given by any one party, the unconcluded proceedings would be heard *de novo.*

The learned counsel for the 2nd defendant submitted that by reason of O. 35 r. 11 I would require the consent of the parties to the proceedings (ie, the plaintiff and the 2nd defendant) before I could continue to hear the case from the stage where Rekhraj J left. Learned counsel argued that since there was no such consent, therefore, I have to hear the case *de novo*.

The learned counsel for the plaintiff, on the other hand, in contending that I ought to continue with the trial from the point where Rekhraj J left relied on:

(a) section 18 of the CJA; and

(b) Practice Direction No. 2/2001.

Section 18 of the CJA provides:

> **18. Proceedings in High Court to be disposed of by single Judge.**
>
> (1) Every proceeding in the High Court and all business arising thereout shall, save as provided by any written law, be heard and disposed of before a single Judge.
>
> (2) Whenever any Judge, after having heard and recorded the whole or any part of the evidence in a proceeding, is unable through death, illness or other cause to conclude the proceeding, another Judge may:
>
> (a) continue with the proceeding from the stage at which the previous Judge left it and:

(i) act on the evidence already recorded by the previous Judge; or

(ii) act on the evidence partly recorded by the previous Judge and partly by himself; or

(b) resummon the witnesses and recommence the proceeding.

(3) Where the Judge acts under subsection 2(a)(i) he may, either on his volition or at the request of any party to the proceeding, recall any of the witnesses as in respect of any part of the evidence already recorded, or he may take their evidence afresh:

Provided that in respect of a criminal proceeding, the Court of Appeal and the Federal Court may, on appeal, set aside any conviction had on evidence not wholly recorded by the Judge before whom the conviction was had if such Court is of the opinion that the accused had been materially prejudiced thereby, and may order a new trial.

The present s. 18 of the CJA was inserted by way of an amendment to the CJA (*vide* Act A940), which came into force on 2 February 1996. The present s. 18 substitutes the old s. 18 of the CJA. The old s. 18 of the CJA, before the amendment, provided:

18. Proceedings in High Court to be disposed of by single Judge.

Every proceeding in the High Court and all business arising thereout shall, save as provided by any written law, be heard and disposed of before a single Judge.

It will be observed that the pre-amended (ie, the old) s. 18 is a simple general provision. Unlike the present s. 18, the pre-amended s. 18 did not contain any provision dealing with the hearing of part-heard cases. And it is also to be noted that sub-s. (1) of the present s. 18 merely reenacts the pre-amended s. 18, word by word (strictly, as a matter of proper legal drafting, Act A940 should have left the original s. 18 as it was; instead, there should have been inserted a separate section (and to be numbered as s. 18A) to deal with the matters now dealt with by sub-ss. (2) and (3) and the proviso of the present s. 18).

Practice Direction No. 2/2001 of 5 September 2001 directs Judges and Judicial Commissioners as follows:

Semua Y.A. Hakim/Pesuruhjaya Kehakiman
Mahkamah Tinggi Malaya

Yang Arif

ARAHAN AMALAN BIL. 2/2001

Perbicaraan Kes-Kes Sivil Separuh Bicara Mahkamah Tinggi
Yang Diambil Alih oleh Hakim yang Baru

Dengan hormatnya perkara di atas dirujuk. Dimaklumkan bahawa terdapatnya beberapa masalah yang timbul terhadap kes-kes sambung bicara yang diambil alih oleh Y.A. Hakim akibat dari perpindahan Hakim, persaraan atau sebab-sebab yang lain. Di antaranya ialah tentang pemakaian Aturan 35 Kaedah 11 Kaedah-Kaedah Mahkamah Tinggi 1980 yang menyatakan:

11 (1) When a Judge who has commenced a trial of any proceedings is unable through death, illness or other cause to conclude the trial, another Judge may with the consent of the parties deal with the evidence already recorded and proceed with the trial from the stage at which the previous Judge left.

Pemakaian aturan di atas telah menimbulkan masalah sekiranya pihak-pihak tidak memberi persetujuan di mana kesannya kes akan dibicarakan semula (de novo). Perbicaraan *de novo* akan menyebabkan kelewatan penyelesaian kes.

2. Sehubungan itu Y.A. dengan ini diarahkan supaya dalam menangani masalah ini Y.A., Y.A. yang mengambil alih pendengaran kes separuh bicara hendaklah menuruti Peruntukan seksyen 18 (2) Akta Mahkamah Kehakiman 1964 di mana persetujuan pihak-pihak tidak diperlukan. Dengan cara ini pendengaran semula *(de novo)* tidak perlu diadakan.

3. Di dalam mengeluarkan arahan ini rujukan juga di buat kepada seksyen 4 Akta Mahkamah Kehakiman 1964 yang memperuntukkan:

> In the event of inconsistency or conflict between this Act and any other written law other than the constitution in force at the commencement of this Act, the provision of this Act shall prevail.

Ini bermakna seksyen 18(2) Akta Mahkamah Kehakiman 1964 mengatasi peruntukkan Aturan 35 Kaedah 11 Kaedah-Kaedah Mahkamah Tinggi 1980.

4. Arahan Amalan ini berkuatkuasa mulai tarikh arahan dikeluarkan.

In the present case, am I required to obtain the consent of the parties before I can continue with the trial from the stage where Rekhraj J left? Am I governed by O. 35 r. 11 of the RHC? In my view, the answer to both these questions is "No".

When the pre-amended s. 18 was in force, O. 35 r. 11 of the RHC was consistent with that section. Indeed, O. 35 r. 11 appropriately complemented the provision of s. 18 then.

However, when s. 18 was amended, there is an inconsistency between the amended s. 18 and O. 35 r. 11. There is this inconsistency because s. 18 gives the judge the power to continue with the trial from the stage where the previous judge left; whereas O. 35 r. 11 states that the judge can only do so with the consent of the parties to the proceeding.

Now, with regard to such an inconsistency, s. 4 of the CJA stipulates:

> **4. Provision to prevent conflict of laws.**
>
> In the event of inconsistency or conflict between this Act and any other written law other than the constitution in force at the commencement of this Act, the provision of this Act shall prevail.

By reason of this provision of the CJA, the present s. 18 prevails over O. 35 r. 11 and the courts with effect from the date when Act A940 came into force (2 February 1996), must disregard O. 35 r. 11. Indeed, even without recourse to s. 4 of the CJA, s. 18 prevails over O. 35 since an Act of Parliament prevails over a subsidiary legislation. Once O. 35 r. 11 is discarded, it follows then that in order for a judge to continue with a trial from the stage where the previous judge left, he is not required to obtain the consent of the parties.

The conclusion is that, based on sub-s. (2) (a) (ii) of the present s. 18 of the CJA, I have the power to continue with the trial at the stage from where Rekhraj J left. The consent of the parties is not required.

In arriving at the decision that I have the power to continue with the trial from the stage where Rekhraj J left by reason of s. 18, and that O. 35 r. 11 has been superseded by s. 18 and no longer applicable, I do not place reliance on Practice Direction No. 2/2001. True, I have earlier in this judgment alluded to this particular Practice Direction, but this is merely to show that the learned counsel for the plaintiff has referred to it. I am not relying on the Practice Direction to justify my decision because, with the greatest respect, I have a serious doubt regarding its validity. In my view, whether or not O. 35 r. 11 is inconsistent with s. 18 (and the effect of s. 4 of the CJA) is a matter of interpretation of statutes. It is for a judge to decide on the interpretation of statutes. Even then, the judge can legally do so only when a matter involving the interpretation of that particular provision of statutory law comes before him in the course of hearing a case. But in my humble view it is inappropriate for Practice Directions to be issued on the interpretation of statutory provisions.

If the learned Chief Judge (Malaya) is of the view that O. 35 r. 11 is inconsistent with s. 18 and should no longer be followed (and in this judgment I share the same view) the proper course of action is, not to issue a Practice Direction, but to recommend to the Rules Committee (of which the Chief Judge (Malaya) himself is a member) to repeal this particular provision of the RHC.

Now, on the premise that I have the power to continue with the trial at the stage from where Rekhraj J left, the next question arises: Should I exercise the power and continue with the trial at the stage where Rekhraj J left – as urged by the plaintiff?

Or, should I hear the case *de novo* based on my powers under sub-s. (2)(b) of s. 18 – as urged by the 2nd defendant?

In my judgment, the principle should be that, as a rule, a judge taking over the conduct of a trial that has been part heard by another judge (by reason, for example, of illness, or the previous judge having retired, died or transferred) ought to continue with the trial at the stage from where the previous judge left. This is in the interest of justice: to avoid delay in the proceedings and unnecessary costs to the parties.

Hearing the case de novo should only be an exception to the general rule. The exceptional situation is where, based on the circumstances of the case, there is a substantial likelihood of injustice if the case is not heard *de novo*. An example where there might be a substantial likelihood of injustice if a case is not heard *de novo* is where, based on the notes of evidence (as recorded by the previous judge) relating to the evidence of the witnesses that had so far testified, the credibility of the witnesses is likely to be an important issue.

The next principle is that the onus is on the party requesting that the case be heard *de novo* to satisfy the court that the case merits a de novo hearing. It is not for the party who takes the position that the present judge should continue from the stage where the previous judge left to convince the court that the case should not be heard *de novo*. If the party moving the court to hear the case *de novo* fails to satisfy the court that there will be a great risk of injustice if the case is not heard *de novo*, then the general rule apply, meaning that the judge should continue with the case from the stage where the previous judge left.

In the present case, bearing the above principles that I have enunciated, it is my finding that the 2nd defendant had failed to satisfy me that the case should be heard *de novo*. The learned counsel for the 2nd defendant, in her written submission, had stressed more on the point that I do not have the power to continue with the trial at the stage where Rekhraj J left by reason of the absence

of consent of the parties. But when she, in the submission, came to the issue as to whether I ought to continue with the trial from where the previous judge left, or whether I should hear the case *de novo* (on the supposition that, by virtue of s. 18, I have the choice) learned counsel merely submitted:

> … it is the Second Defendant's humble submission that the credibility and veracity of the witnesses of both the Plaintiff and Second Defendant is of utmost importance and in all fairness and also in the interest of justice this case ought to be heard *de novo.*

With respect, having so submitted, it is incumbent on the learned counsel to explain, by referring to the pertinent parts of the notes of evidence, as recorded by the previous judge, as to why in the interest of justice this case ought to be heard *de novo*. Unfortunately, this is not done.

On the other hand, although it is not incumbent upon the plaintiff to convince the court as to why the case should **not** be heard *de novo*, nonetheless, the learned counsel for the plaintiff in his written submissions has taken pains to explain that, based on the notes of evidence, as recorded by Rekhraj J, it is an exercise in futility for the court to hear the case *de novo*. Counsel also argued that it is unjust to the plaintiff if the case is to be heard de novo as PW1 resides in Finland and PW2 resides in Singapore. To recall these two witnesses would result in the incurring of substantial expenses and delay in the proceedings. I agree with this submission.

Although the learned counsel for the 2nd defendant, in her written submission, has not referred to the notes of evidence as recorded by Rekhraj J, nevertheless, I have taken the liberty to scrutinize the notes myself. And I do not see anything in the notes that warrants the recalling of PW1 and PW2 – at least not, for the time being.